

**AGENDA DOCUMENT NO. 12-89**

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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

2012 DEC 19 PM 4: 28

**AGENDA ITEM**

For Meeting of 12-20-12

December 19, 2012 **SUBMITTED LATE**

**MEMORANDUM**

TO: The Commission

FROM: Anthony Herman  
General Counsel *Anthony Herman*

Subject: Notice of Request for Comment on Agency Enforcement Process

Attached is a proposed draft of the subject Federal Register notice. My Office has been asked to have this draft placed on the Open Session agenda for December 20, 2012.

Attachment

1 **FEDERAL ELECTION COMMISSION**

2  
3 **11 CFR Part 111**

4  
5 **[Notice 2012-XX]**

6  
7 **Request for Comment on Enforcement Process**

8  
9 **AGENCY:** Federal Election Commission.

10  
11 **ACTION:** Request for comments.

12  
13 **SUMMARY:** The Federal Election Commission is requesting comment on certain aspects of its  
14 enforcement process. First and foremost, the Commission welcomes public comment on whether  
15 this agency is doing an effective job in enforcing the Act and Commission regulations.

16 Additionally, the Commission is currently reviewing and seeks public comment on: (1) its  
17 policies, practices, and procedures during the enforcement process stage set forth in 2 U.S.C.  
18 437g(a)(1), prior to the Commission's determination of whether there is "reason to believe" that  
19 a person has committed, or is about to commit, a violation of the Federal Election Campaign Act  
20 of 1971, as amended, 2 U.S.C. 431 et. seq. ("FECA" or "the Act") and/or the Commission's  
21 implementing regulations; and (2) the Commission's authority under 2 U.S.C. 437g(a)(5) to seek  
22 civil penalties from respondents pursuant to a finding of "probable cause to believe" that a  
23 respondent has violated the Act and/or Commission regulations, as well as the Commission's  
24 practice of seeking civil penalties prior to a finding of probable cause.

25 **DATES:** Comments must be received on or before Friday, March 15, 2013. The Commission  
26 will determine at a later date whether to hold a hearing.

27 **ADDRESSES:** All comments must be in writing. Comments may be submitted electronically  
28 via email to [process@fec.gov](mailto:process@fec.gov). Commenters are encouraged to submit comments electronically to  
29 ensure timely receipt and consideration. Alternatively, comments may be submitted in paper

1 form. Paper comments must be sent to the Federal Election Commission, Attn.: Commission  
2 Secretary, 999 E Street NW, Washington, DC 20463. All comments must include the full name  
3 and postal service address of the commenter, and of each commenter if filed jointly, or they will  
4 not be considered. The Commission will post comments on its website at the conclusion of the  
5 comment period.

6 **FOR FURTHER INFORMATION CONTACT:** Mr. Stephen A. Gura, Deputy Associate  
7 General Counsel for Enforcement, 999 E Street NW., Washington, DC 20463, (202) 694–1650  
8 or (800) 424–9530.

9 **SUPPLEMENTARY INFORMATION:**

10 **Background**

11 I. Past Commission Hearings and Enforcement Process Reforms

12 The Commission is currently reviewing, and seeks public comment on, certain  
13 enforcement policies, practices, and procedures. The Commission will use the comments  
14 received to determine whether its policies, practices, or procedures should be adjusted, and  
15 whether rulemaking in these areas is advised. The Commission has made no decisions in these  
16 areas and may choose to take no action. The Commission last conducted a comprehensive review  
17 of its enforcement policies, practices, and procedures, among other issues, in late 2008 and early  
18 2009. See Agency Procedures, 73 FR 74494 (Dec. 8, 2008). Comments filed in the 2008 / 2009  
19 review, as well as a transcript of the public hearing, are available on the Commission’s website at  
20 <http://www.fec.gov/law/policy/enforcement/publichearing011409.shtml>. Subsequent to that  
21 review, the Commission adopted or formalized several procedures pertaining to the advisory  
22 opinion, audit, enforcement, and reports analysis processes, as well as providing greater

1 transparency of the agency’s enforcement procedures. These procedures include, in  
2 chronological order:

- 3 • The Commission instituted a program that provides political committees that are audited  
4 pursuant to the Act with the opportunity to have a hearing before the Commission prior to  
5 the Commission’s adoption of a Final Audit Report. Similar to the Commission’s  
6 program for hearings at the probable cause stage of the enforcement process, audit  
7 hearings provide audited committees with the opportunity to present oral arguments to  
8 the Commission directly and give the Commission an opportunity to ask relevant  
9 questions prior to adopting a Final Audit Report. See Commission’s Procedural Rules for  
10 Audit Hearings, 74 FR 33140 (July 10, 2009), available at  
11 [http://www.fec.gov/law/cfr/ej\\_compilation/2009/notice\\_2009-12.pdf](http://www.fec.gov/law/cfr/ej_compilation/2009/notice_2009-12.pdf).
- 12 • The Commission adopted a new agency procedure that provides respondents in internally  
13 generated enforcement matters brought under the Act with notice of the referral and an  
14 opportunity to respond thereto, prior to the Commission’s consideration of whether there  
15 is reason to believe that a violation of the Act has been or is about to be committed by  
16 such respondent. This program provides respondents procedural protections similar to  
17 those of respondents in complaint-generated matters. See Commission’s Procedure for  
18 Notice to Respondents in Non-Complaint Generated Matters, 74 FR 38617 (Aug. 4,  
19 2009), available at [http://www.fec.gov/law/cfr/ej\\_compilation/2009/notice\\_2009-18.pdf](http://www.fec.gov/law/cfr/ej_compilation/2009/notice_2009-18.pdf).
- 20 • The Commission amended its procedures for probable cause hearings to provide that  
21 Commissioners may ask questions designed to elicit clarification from the Office of  
22 General Counsel (“OGC”) or Office of the Staff Director during the hearings. These  
23 hearings, if the request is granted, take place before the Commission considers the

1 General Counsel's recommendation on whether or not to find probable cause to believe a  
2 violation has occurred. See Amendment of Agency Procedures for Probable Cause  
3 Hearings, 74 FR 55443 (Oct. 28, 2009), available at  
4 [http://www.fec.gov/law/cfr/ej\\_compilation/2009/notice\\_2009-24.pdf](http://www.fec.gov/law/cfr/ej_compilation/2009/notice_2009-24.pdf).

- 5 • The Commission resumed its practice of placing all First General Counsel's Reports on  
6 the public record, whether or not the recommendations in these First General Counsel's  
7 Reports are adopted by the Commission. The Commission will place all First General  
8 Counsel's reports on the public record in closed matters prospectively and retroactively,  
9 while allowing the Commission to reserve the right to redact portions as necessary. See  
10 Statement of Policy Regarding Placing First General Counsel's Reports on the Public  
11 Record, 74 FR 66132 (Dec. 14, 2009), available at  
12 [http://www.fec.gov/law/cfr/ej\\_compilation/2009/notice\\_2009-28.pdf](http://www.fec.gov/law/cfr/ej_compilation/2009/notice_2009-28.pdf).

- 13 • The Commission adopted, made public, and recently updated a "Guidebook for  
14 Complainants and Respondents on the FEC Enforcement Process" ("Current  
15 Enforcement Guidebook"). This guide was first approved and placed on the  
16 Commission's website in December 2009 and updated in May 2012. See  
17 [http://www.fec.gov/em/respondent\\_guide.pdf](http://www.fec.gov/em/respondent_guide.pdf). The Current Enforcement Guidebook  
18 summarizes the Commission's general enforcement policies and procedures and provides  
19 a step-by-step guide through the Commission's enforcement process. It is designed to  
20 assist complainants and respondents and to educate the public concerning FEC  
21 enforcement matters.

- 22 • The Commission issued a directive providing written guidelines on providing status  
23 reports to respondents and the Commission in enforcement matters and accelerating the

1 processing of matters that are statute of limitations-sensitive. See FEC Directive 68,  
2 Enforcement Procedures (Dec. 31, 2009), available at  
3 [http://www.fec.gov/em/directive\\_68.pdf](http://www.fec.gov/em/directive_68.pdf).

- 4 • The Commission issued a directive on how the Office of Compliance may seek formal or  
5 informal legal guidance from OGC regarding questions of law that arise from the review  
6 of reports filed with the Commission or in the course of an audit of a political committee.  
7 See FEC Directive 69, FEC Directive on Legal Guidance to the Office of Compliance,  
8 available at [http://www.fec.gov/directives/directive\\_69.pdf](http://www.fec.gov/directives/directive_69.pdf).

- 9 • The Commission issued a directive on how the Audit staff prepares and the Commission  
10 considers audit reports produced during the various stages of an audit. See FEC Directive  
11 70, FEC Directive on Processing Audit Reports (Apr. 26, 2011), available at  
12 [http://www.fec.gov/directives/directive\\_70.pdf](http://www.fec.gov/directives/directive_70.pdf).

- 13 • The Commission established a formal procedure to provide respondents in enforcement  
14 matters with relevant documents and other information obtained as a result of an  
15 investigation during the enforcement process. These documents and information are  
16 generally available by request from the respondent when the Commission enters into  
17 conciliation or proceeds to the probable cause stage of the enforcement process. See  
18 Agency Procedure for Disclosure of Documents in the Enforcement Process, 76 FR  
19 34986 (June 15, 2011), available at  
20 [http://www.fec.gov/law/cfr/ej\\_compilation/2011/notice\\_2011-06.pdf](http://www.fec.gov/law/cfr/ej_compilation/2011/notice_2011-06.pdf).

- 21 • The Commission adopted a procedure providing for a means by which persons and  
22 entities may have a legal question considered by the Commission earlier in both the  
23 report review process and the audit process. Specifically, when the Office of Compliance

1 requests that a person or entity take corrective action during the report review or audit  
2 process, if the person or entity disagrees with the request based upon a material dispute  
3 on a question of law, the person or entity may seek Commission consideration of the  
4 issue pursuant to this procedure. See Commission's Policy Statement Regarding a  
5 Program for Requesting Consideration of Legal Questions by the Commission, 76 FR  
6 45798 (Aug. 1, 2011), available at  
7 [http://www.fec.gov/law/cfr/ej\\_compilation/2011/notice\\_2011-11.pdf](http://www.fec.gov/law/cfr/ej_compilation/2011/notice_2011-11.pdf).

- 8 • The Commission adopted procedures to formalize the agency's practice, following  
9 probable cause briefs, of providing respondents with a copy of OGC's notice to the  
10 Commission advising the Commission whether it intends to proceed with its  
11 recommendation to find probable cause. Additionally, these procedures allow a  
12 respondent to request an opportunity to reply to the notice, if the notice contains new  
13 facts or new legal arguments. See Agency Procedure Following the Submission of  
14 Probable Cause Briefs by the Office of General Counsel, 76 FR 63570 (October 13,  
15 2011), available at [http://www.fec.gov/law/cfr/ej\\_compilation/2011/notice\\_2011-15.pdf](http://www.fec.gov/law/cfr/ej_compilation/2011/notice_2011-15.pdf).
- 16 • The Commission announced that it is now beginning to provide respondents an  
17 explanation in writing of the method used to determine the Commission's opening  
18 settlement offers at the conciliation stage of certain enforcement matters. See  
19 <http://www.fec.gov/press/press2012/20120112openmeeting.shtml>.
- 20 • The Commission recently made public several documents relating to its enforcement and  
21 compliance practices following a November 3, 2011 oversight hearing before the  
22 Subcommittee on Elections of the House of Representatives Committee on House  
23 Administration. Those documents included various enforcement materials, including the

1 1997 enforcement manual (which has not been formally updated and contains much  
2 information that has been superseded), Reports Analysis Division procedures, and Audit  
3 Division documents. See Documents on Enforcement & Compliance Practices, available  
4 at [http://www.fec.gov/law/procedural\\_materials.shtml](http://www.fec.gov/law/procedural_materials.shtml).

## 5 II. Ongoing Reviews of Enforcement Procedures

6 The 1997 enforcement manual recently placed on the Commission's website was  
7 compiled as an informal internal guide not intended for public release, was never formally  
8 reviewed or adopted by the Commission, was seldom updated, and has been largely superseded.  
9 OGC is now in the process of drafting and making public an enforcement procedures manual  
10 ("Enforcement Procedures Manual" or "Manual") to guide the Enforcement Division during the  
11 course of the agency's enforcement process. The purpose of the Manual is to aid enforcement  
12 staff in the consistent, fair, effective and efficient performance of their important public  
13 responsibilities in administering the Act, with the goal of serving as a reliable source of  
14 information regarding all aspects of the enforcement process. The Commission is seeking public  
15 comment on whether certain of its policies, practices and procedures related to the enforcement  
16 process should be adjusted, whether rulemaking in this area is advised, and what other  
17 considerations should be given to the contents of the Manual. The Commission has made no  
18 decisions on these issues and may choose to take no action.

## 19 III. General Goals

20 The FECA grants to the Commission "exclusive jurisdiction with respect to civil  
21 enforcement" of the provisions of the Act and Chapters 95 and 96 of Title 26. 2 U.S.C.  
22 437c(b)(1). Enforcement matters may be initiated by the Commission as a result of complaints  
23 from the public, referrals from the Reports Analysis and Audit Divisions, referrals from other

1 agencies, and sua sponte submissions. Enforcement matters are generally administered by the  
2 Office of General Counsel pursuant to the procedures set forth in 2 U.S.C. 437g, but are also  
3 processed by the Office of Alternative Dispute Resolution and the Office of Administrative  
4 Review. See 2 U.S.C. 437g(a)(4)(C); 11 CFR 111.30-111.46; <http://www.fec.gov/em/adr.shtml>;  
5 <http://www.fec.gov/af/af.shtml>. During the enforcement process, the Office of General Counsel  
6 reviews and makes recommendations to the Commission regarding the disposition of  
7 enforcement matters, and investigates and conciliates matters on behalf of the Commission.  
8 Stages of the enforcement process may include Reason to Believe (“RTB”), an investigation,  
9 pre-probable cause conciliation, probable cause, probable cause conciliation, and litigation. The  
10 Current Enforcement Guidebook provides a full description of the Commission’s administrative  
11 enforcement process. See [http://www.fec.gov/em/respondent\\_guide.pdf](http://www.fec.gov/em/respondent_guide.pdf).

12         The Commission specifically seeks comment from complainants and respondents who  
13 directly interact with the FEC, committee treasurers, and other parties who may become involved  
14 in the enforcement process. The Commission seeks general comments on whether the agency is  
15 effectively enforcing the Act and Commission regulations and whether certain of the FEC’s  
16 enforcement procedures and practices unduly limit or expand procedural protections and, if so,  
17 how those enforcement procedures might be improved to increase efficiency and adequately  
18 address the Commission’s interest in enhancing compliance with the Act. The Commission is not  
19 interested, with respect to this proceeding, in complaints or compliments about individual  
20 matters or FEC employees, and it seeks input only on structural, procedural, and policy issues.

21         In that regard, the Commission also seeks comment about practices and procedures used  
22 by other administrative agencies when acting in an enforcement capacity. For example, do such  
23 agencies provide greater or lesser procedural protections? The Commission is also interested in

1 any studies, surveys, research or other empirical data that might support changes in its  
2 enforcement procedures, as well as any relevant judicial decisions pertaining to administrative  
3 agencies.

4 The Commission requests those who submit comments to be cognizant that certain  
5 proposals may implicate statutory requirements, such as confidentiality mandates. See 2 U.S.C.  
6 § 437g(a)(12). Thus, the Commission would appreciate participants specifying in their written  
7 remarks whether their proposals are compatible with current statutes or would require legislative  
8 action.

### 9 **Topics for Specific Comments**

10 As stated, as an initial matter, the Commission requests public comment on whether this  
11 agency is doing an effective job of enforcing the Act and Commission regulations.

### 12 **IV. Enforcement Process at the Pre-RTB Stage**

13 The Act provides that complaints alleging a violation of the Act or Commission  
14 regulations shall be in writing, signed and sworn to by the person filing the complaint, notarized,  
15 and made under penalty of perjury. 2 U.S.C. 437g(a)(1). Respondents who are alleged in a  
16 complaint to have committed such a violation have the opportunity to respond in writing as to the  
17 allegations. Id. Following the receipt of a response, the General Counsel may recommend to the  
18 Commission whether or not to find RTB that there has been a violation of the Act. 11 CFR  
19 111.7(a). Commission regulations also empower “the General Counsel [to] recommend in  
20 writing that the Commission find reason to believe . . . ,” not only based on a complaint, but also  
21 “[on] the basis of information ascertained by the Commission in the normal course of carrying  
22 out its supervisory responsibilities.” 11 CFR 111.8(a).

1           Following an affirmative vote of four or more of its members determining that there is  
2 RTB that a respondent has committed, or is about to commit, a violation, the Commission “shall  
3 make an investigation of such alleged violation.” 2 U.S.C. § 437g(a)(2). An RTB finding is not a  
4 finding that the respondent violated the Act. It simply means that the Commission believes a  
5 violation may have occurred. An RTB finding is generally followed by either an investigation of  
6 the matter or an offer of pre-probable cause conciliation.<sup>1</sup>

#### 7 A. Complaint Generated Matters

8           Most of the Commission’s enforcement matters are externally generated based on  
9 complaints submitted by individuals pursuant to the requirements of 2 U.S.C. § 437g(a)(1). Prior  
10 to the Commission’s RTB determination in a complaint-generated matter, OGC makes a  
11 recommendation to the Commission as to whether, based on the complaint(s) and response(s) in  
12 a given matter, there is sufficient information to support an RTB finding. In the course of  
13 developing its RTB recommendation, OGC may reference publicly available information,  
14 including public information not contained in either the complaint(s) or response(s).<sup>2</sup> Public  
15 sources for these additional facts have included, among other things, Internet websites (most  
16 frequently, the Commission’s own website), media reports, subscription databases, public  
17 information filed with other governmental entities, and respondents’ own public statements and  
18 websites.<sup>3</sup> Additionally, OGC, in its RTB recommendations to the Commission, analyzes the

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<sup>1</sup> See Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 FR 12545, 12545-46 (Mar. 16, 2007).

<sup>2</sup> See, e.g., *id.* at 12546 (relying on “publicly available information” in making determination at pre-RTB stage); see also Enforcement Procedure 1992-10 (Subject: News Articles), Enforcement Procedure 1989-6 (Subject: Miscellaneous Information), available at [http://www.fec.gov/pdf/Additional\\_Enforcement\\_Materials.pdf](http://www.fec.gov/pdf/Additional_Enforcement_Materials.pdf) (“Where publically available information from state election reports or from state or federal agencies is needed in the context of a MUR, you do not have to wait until RTB has been found to seek that information. You should try and obtain that information before RTB and include it in your analysis.”).

<sup>3</sup> The 1997 Enforcement Manual provided the following, non-comprehensive list of publicly available sources to be consulted before OGC made its initial recommendation: WESTLAW/LEXIS; Dun & Bradstreet; Newspaper

1 facts presented in the case under all relevant legal theories, not solely those theories specifically  
2 articulated in the complaint or addressed in the response.

3 The Commission seeks comment on two of OGC's current practices related to the pre-  
4 RTB stage of the enforcement process as it is set forth under 2 U.S.C. 437g(a) and Part 111 of  
5 the Commission's regulations.

6 First, in a complaint-generated matter, do the Act and Commission regulations  
7 contemplate a Commission finding of RTB based on, or that takes into account, publicly  
8 available information not referenced or included in the complaint and response? Do the statute  
9 and regulations contemplate a Commission finding of RTB based solely on the allegations and  
10 information set forth in the complaint(s) and response(s)? Do the statute and regulations require  
11 the Commission to ignore publicly available information that may be material to the issue of  
12 RTB? Would that include public information disclosed as required by the Act and posted on the  
13 Commission's own website? Should exculpatory facts obtained by the Commission at the pre-  
14 RTB stage be considered along with the pending complaint?

15

16 The Commission's practice of considering material not specifically referenced or  
17 included in a complaint is supported by the case law. In the In re FECA Litigation decision,<sup>4</sup> the

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Articles; FEC Press Office; Martindale Hubbell; State Corporate Divisions; State Ethics/Political Reporting Agencies; and Reference Material. See 1997 Enforcement Manual, Chapter 2 at 5-6, available at [http://www.fec.gov/pdf/1997\\_Enforcement\\_Manual.pdf](http://www.fec.gov/pdf/1997_Enforcement_Manual.pdf).

The Commission may, on occasion, receive non-public information from a governmental agency (typically the U.S. Department of Justice) that may serve as a basis for an internally generated complaint or related to a complaint-generated matter in which the Commission has not yet made any findings. However, under the Commission's Procedure for Notice to Respondents in Non-Complaint Generated Matters (described *supra*), a DOJ or other law enforcement agency referral will be provided to the respondent if OGC intends to initiate an enforcement proceeding based on it. 74 FR 38617-18. In cases where, due to law enforcement purposes, the referral document may not be provided to a respondent, OGC will provide the respondent with a letter containing sufficient information regarding the facts and allegations to afford the respondent an opportunity to show that no action should be taken. *Id.* at 38618. <sup>4</sup> 474 F. Supp. 1044, 1046 (D.D.C. 1979) ("[I]t seems clear that the Commission must take into consideration all available information concerning the alleged wrongdoing. In other words, the Commission may not rely solely on

1 U.S. District Court for the District of Columbia interpreted 2 U.S.C. 437g(a)(1) and (a)(2) as  
2 requiring the Commission “to take into consideration all available information concerning the  
3 alleged wrongdoing” when making its RTB determination in a complaint-generated matter. 474  
4 F. Supp. at 1046 (emphasis added). See also Antosh v. FEC, 599 F. Supp. 850 (D.D.C. 1984)  
5 (holding that Commission’s dismissal of a complaint was arbitrary and capricious where the  
6 Commission failed to consider relevant information available in a committee’s disclosure reports  
7 revealing that alleged violations were “more egregious than the Commission realized”). 599 F.  
8 Supp. at 855.

9         Should the Commission, through OGC, maintain a practice consistent with the case law?  
10 If the Commission “may not rely solely on the facts presented by the sworn complaint when  
11 deciding whether to investigate,” what is the minimum factual information it must consider when  
12 making an RTB determination pursuant to 2 U.S.C. § 437g(a)(2)? For example, does the current  
13 practice afford respondents sufficient opportunity to address facts and legal theories not  
14 contained in the complaint in the course of the Commission’s deliberations on finding RTB?

15         Also, does the current practice conflict with the statutory and regulatory language that the  
16 Commission “shall make an investigation of such alleged violation” after a finding of RTB by an  
17 affirmative four votes of the Commission? Does the use of facts obtained from Internet searches  
18 (including the Commission’s own website), respondents’ own public statements and websites,  
19 media reports, subscription databases, and public information filed with the Commission or other  
20 governmental entities in the Commission’s deliberations constitute an investigation that must be  
21 preceded by a finding of RTB? Concerning the use of facts obtained from the public record,

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the facts presented by the sworn complaint when deciding whether to investigate. Although the facts provided in a sworn complaint may be insufficient, when coupled with other information available to the Commission gathered either through similar sworn complaints or through its own work the facts may merit a complete investigation. . . . [I]t is clear that a consideration of all available information material is vital to a rational review of Commission decisions.”) (emphasis added).

1 should the Commission draw guidance from the evidentiary practice in litigation of taking  
2 judicial notice? Would such facts include those created or controlled by the respondent, such as  
3 information on a respondent’s own website or a respondent’s other public statements?

4 Second, do the Act and Commission regulations contemplate – or implicitly require – a  
5 Commission finding of RTB in appropriate circumstances based on legal theories not alleged in  
6 the complaint?

7 In making an RTB recommendation to the Commission, OGC may include legal theories  
8 related to the facts of the case that were not specifically alleged in the complaint or addressed in  
9 the response, but which are directly related to the facts alleged. Do the statute and regulations  
10 require the Commission to ignore additional potential violations that are supported by the facts  
11 but not specifically alleged in the complaint? OGC has recently adopted the practice of notifying  
12 respondents of such legal theories and affording respondents with an opportunity to respond.  
13 Does OGC’s current practice afford respondents sufficient opportunity to address additional  
14 legal theories not specifically contained in the complaint in the course of the Commission’s  
15 deliberations on finding RTB? Does the requirement that the Commission “set forth the factual  
16 basis for such alleged violation,” 2 U.S.C. § 437g(a)(2), adequately ensure the fairness of the  
17 enforcement process by providing respondents an opportunity to address these additional legal  
18 theories after a reason to believe finding?

19

1 B. Internally Generated Matters

2 Alternatively, the Act provides that RTB may be found “on the basis of information  
3 ascertained in the normal course of carrying out [the Commission’s] supervisory  
4 responsibilities.” See 2 U.S.C. § 437g(a)(2). As noted, the Commission’s regulations further  
5 provide that, “[o]n the basis of information ascertained by the Commission in the normal course  
6 of carrying out its supervisory responsibilities, or on the basis of a referral from an agency of the  
7 United States or of any state, the General Counsel may recommend in writing that the  
8 Commission find [RTB] that a person or entity has committed or is about to commit a violation”  
9 of the Act or regulations. 11 CFR 111.8(a).

10 The primary types of internally generated matters are (a) those based on referrals from  
11 within the Commission (internally generated from RAD or the Audit Division), (b) those based  
12 on referrals from other government agencies, and (c) those that are part of ongoing matters. The  
13 Commission also processes sua sponte submissions, i.e., voluntary submissions made by persons  
14 who believe they may have violated campaign finance laws, but which may contain allegations  
15 against other parties that result in a separate enforcement matter with additional respondents.

16 Before the Commission votes on OGC’s recommendations as to any referral, respondents  
17 will have an opportunity to review and respond to the referral. See Commission’s Procedure for  
18 Notice to Respondents in Non-Complaint Generated Matters, 74 FR 38617 (Aug. 4, 2009). The  
19 statute and Commission regulations do not restrict what information the Commission may  
20 consider in its supervisory responsibilities.<sup>5</sup>

21 Additionally, in Directive 6, entitled “Handling of Internally Generated Matters,” the  
22 Commission in 1978 specified the following non-exhaustive sources as falling within the scope

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<sup>5</sup> The regulations do specify that, prior to taking action against any person who has failed to file certain disclosure reports, the Commission shall notify that person. See 11 CFR 111.8(c).

1 of 2 U.S.C. § 437g(a)(2): (1) referrals from the Commission’s operating divisions (i.e., Audit,  
2 Reports Analysis, and Public Disclosure); (2) referrals from other government agencies and  
3 government documents made available to the public or to the Commission; (3) Commission-  
4 authorized non-routine reviews of reports and other documents, provided that it is based on a  
5 uniform policy of review of a particular category of candidates or other reporting entities or a  
6 category of reports, for the purpose of ascertaining specific types of information; and (4) news  
7 articles and similar published sources, considering such factors as the particularity with which  
8 the alleged violations are set out in such sources and whether such allegations are supported by  
9 in-house documents. See Directive 6, available at  
10 [http://www.fec.gov/directives/directive\\_06.pdf](http://www.fec.gov/directives/directive_06.pdf).

11 Does the current practice of bringing to the Commission’s attention media reports and  
12 publicly available information filed with the Commission or other governmental entities comport  
13 with Directive 6 with respect to the permissible sources of information the Commission may  
14 consider in its RTB determination? Does Directive 6 itself properly set forth the scope of  
15 information the Commission may consider in its RTB determination pursuant to the statute and  
16 regulations? Are there other sources of information that the Commission needs or should  
17 consider in its normal course during the pre-RTB stage, beyond those in Directive 6?

18 At the RTB stage, OGC’s recommendations may take into account the types of  
19 information referred to in Directive 6. Should the reliance on this type of information in the  
20 Directive 6 context – that is, internally generated matters – inform OGC’s recommendations in  
21 complaint-generated matters? Should OGC use relevant publicly available information to  
22 support its recommendations, or do the statute, regulations, Directive 6, or other Commission  
23 procedures or policies require such information to form the basis of a separate (or

1 complementary) internally generated matter? What benefits and drawbacks would result from  
2 generating an additional enforcement matter beyond the complaint-generated matter compared  
3 with relying on such information in assessing the complaint? Under the Commission’s recently  
4 formalized procedures discussed above, should respondents continue to be informed of, and  
5 given the opportunity to respond to, relevant publicly available information that OGC may use to  
6 support its RTB recommendations? See Agency Procedure for Notice to Respondents in Non-  
7 Complaint Generated Matters, 74 FR 38617 (Aug. 4, 2009). Should OGC’s recently  
8 implemented informal policy of doing so be formalized by the Commission?

9 C. Specific Proposals

10 In light of the issues discussed above, the Commission seeks comment on several  
11 approaches the agency could take with respect to OGC’s pre-RTB process, as well as any  
12 approach not set forth below.

13 1. Approaches to Use of Factual Information Beyond Complaint

14 The Commission could maintain its current approach as reflected in Directive 6 and the  
15 Policy Statement on the Initial Stages of Enforcement. What are the advantages and  
16 disadvantages to this current practice?

17 Another approach the Commission could consider is to discontinue its current practice of  
18 taking into consideration in its RTB determination any relevant publicly available information  
19 that is not specifically included in complaints and responses. Assuming that Directive 6 is  
20 consistent with the Act and Commission regulations, and notwithstanding that it currently  
21 applies only to internally generated matters, should the Directive limit OGC’s use of publicly  
22 available information not included in complaints and responses? For example, Directive 6 states  
23 that non-routine reviews of reports or other documents (“reports and other documents” is not  
24 defined) available to the Commission require “specific prior approval of the Commission.”

1 Moreover, even with Commission authorization, such reviews are appropriate only for a  
2 “particular category of candidates or other reporting entities or a review of a category of reports  
3 for specific types of information.” In other words, should Commission-authorized reviews of  
4 reports or other documents outside the scope of complaints be generalized and not be used to  
5 supplement particular complaints?

6         Additionally, Directive 6 states that news articles and other similar published accounts  
7 may constitute the source of internally generated MURs, depending on such factors as the  
8 “particularity with which the alleged violations are set out in the article” and “supported by in-  
9 house documents.” Unlike reviews of internal Commission reports and documents, Directive 6  
10 does not address whether news articles and similar materials may be used to supplement existing  
11 complaints because the Directive primarily addresses internally generated matters. The  
12 Commission requests comment on whether these aspects of Directive 6 suggest that the  
13 Commission should refrain from considering relevant public information that is not specifically  
14 set forth in complaints and responses. How should Directive 6 be amended to achieve greater  
15 efficiency and fairness? What if the Commission uncovers facts that are exculpatory and  
16 undercut the allegations? Should the Commission ignore all relevant public information  
17 regardless of whether it is inculpatory or exculpatory? If the Commission may institute  
18 enforcement actions based on reviews of news media, are there other constraints on which  
19 articles or allegations can give rise to enforcement actions? For example, would unsourced or  
20 anonymous allegations constitute a “complaint of a person whose identity is not disclosed,”  
21 which would preclude the Commission from taking action on those allegations? See 2 U.S.C.  
22 437g(a)(1).

1            Assuming, under either approach, that the Commission maintains its practice of using  
2 news articles as a basis for internally generated enforcement matters, the Commission seeks  
3 comment on whether separate internally generated matters should be initiated on the basis of  
4 information outside a complaint that OGC gathers during the pre-RTB process, whereupon a  
5 separate notification letter would be sent to respondents setting forth the additional information  
6 as well as legal theories that OGC is considering. Should OGC be required to receive specific  
7 prior approval of the Commission in order to take into consideration relevant public information  
8 outside a complaint during the pre-RTB process? Should Directive 6 be modified to provide  
9 OGC with authority to consider relevant publicly available information? The Commission  
10 requests comment on whether such an approach, if adopted, should be limited in the scope of the  
11 additional facts and legal theories that OGC may consider and ask respondents to address. In  
12 other words, should there be a requirement that such additional information and/or theories be  
13 closely related or pertinent to the original complaint?

## 14 2. Scope of Legal Theories Presented in Complaint

15            The Commission recognizes that complainants may not possess broad or detailed  
16 knowledge of the Act or regulations and that the regulations merely require a complaint to recite  
17 facts, whether on the basis personal knowledge or information and belief, that describe a  
18 violation of law under the Commission's jurisdiction (citations to the law and regulations are not  
19 necessary but helpful), similar to notice proceedings in civil litigation. Accordingly, the  
20 Commission seeks comment as to when legal theories supporting OGC's RTB recommendations  
21 should be considered violations alleged in the complaint or whether they are otherwise  
22 appropriate to use to support the recommendations. For example, if there is a secondary violation  
23 that flows from a set of facts alleged, but the complaint does not specifically allege that violation,

1 should the Commission consider an RTB recommendation on the secondary violation (e.g., when  
2 the complaint alleges that a corporate contribution was made in the form of a coordinated  
3 advertisement, but the same facts also show that the cost of the ad was not disclosed as required  
4 by 2 U.S.C. 434 and did not contain a disclaimer as required by 2 U.S.C. 441d)? If not, should  
5 the Commission seek further input from a complainant to determine whether he or she intended  
6 to allege a potential secondary violation based on the facts presented in the complaint? Under  
7 what circumstances should the Commission consider seeking further input from complainants?

8           Alternatively, the Commission could retain its existing approach of integrating relevant  
9 publicly available information and/or additional legal theories not specifically included in  
10 complaints and responses into existing complaint-generated matters. However, the Commission  
11 is considering whether and under what circumstances to apprise respondents of such information  
12 or theories. One such approach was discussed, but not voted on (and remains pending before the  
13 Commission), at the open meeting of December 1, 2011. See “Agency Procedure for Notice to  
14 Named Respondents in Enforcement Matters of Additional Material Facts and/or Additional  
15 Potential Violations,” dated November 10, 2011, available at  
16 [http://www.fec.gov/agenda/2011/mtgdoc\\_1165.pdf](http://www.fec.gov/agenda/2011/mtgdoc_1165.pdf). Under that proposal, a respondent would be  
17 given written notice by OGC in the event that OGC intends to include in its RTB  
18 recommendation to the Commission (1) any additional facts or information known to OGC and  
19 not created by or controlled by the respondent, which are deemed to be material to the RTB  
20 recommendation, and (2) any potential violation of the Act and/or the regulations that may not  
21 have been specifically alleged in the complaint or included in the referral notification, and the  
22 facts and arguments supporting the RTB recommendation on the additional potential violation.  
23 The proposal specified that, within 10 days from receipt of the OGC notice, the respondent may

1 submit a written statement demonstrating why the Commission should take no action based on  
2 the additional material facts or with regard to any potential violation. See id.

3 The Commission requests comment on the merits of the above-mentioned approaches, as  
4 well as any others, including whether they are consistent with the enforcement process set forth  
5 in the Act and regulations, and which if any should be adopted.

## 6 V. Civil Penalties and Other Remedies

### 7 A. Background

8 After the Commission finds RTB, conducts an investigation, and finds probable cause to  
9 believe that a respondent has violated the Act and Commission regulations, the Act requires the  
10 Commission to attempt to enter into a conciliation agreement with respondents. 2 U.S.C.  
11 437g(a)(4). This conciliation agreement may include a requirement that the respondent pay a  
12 civil penalty. 2 U.S.C. 437g(a)(5). Conciliation agreements may require respondents to pay civil  
13 penalties in the following amounts:

- 14 • For violations that are not knowing and willful, a penalty not to exceed the greater of  
15 \$7,500 or an amount equal to any contribution or expenditure involved in the violation;
- 16 • For violations that are knowing and willful, a penalty not to exceed the greater of  
17 \$16,000 or an amount equal to 200 percent of any contribution or expenditure involved in  
18 the violation;
- 19 • For knowing and willful violations of 2 U.S.C. 441f (contributions made in the name of  
20 another), a penalty not less than 300 percent of the amount involved in the violation and  
21 not more than the greater of \$60,000 or 1,000 percent of the amount involved in the  
22 violation.

1 2 U.S.C. 437g(a)(5)(A) and (B). The dollar amounts set forth above are indexed for inflation. See  
2 28 U.S.C. 2461; see also 11 CFR 111.24.

3           Although the Commission is not required to enter into settlement negotiations unless and  
4 until it makes a finding of probable cause, as a matter of practice, when appropriate, the  
5 Commission attempts to settle matters with respondents prior to such a finding (“pre-probable  
6 cause conciliation”). 11 CFR 111.18(d). In most cases the Commission will have already made  
7 an RTB finding; however, it may also enter into mutually acceptable “fast-track” settlements  
8 prior to any finding for persons who file complete sua sponte submissions and fully cooperate  
9 with the Commission, as described in the Commission’s Policy Regarding Self-Reporting of  
10 Campaign Finance Violations (Sua Sponte Submissions), 72 FR 16695 (Apr. 5, 2007), also  
11 available at [http://www.fec.gov/law/cfr/ej\\_compilation/2007/notice\\_2007-8.pdf](http://www.fec.gov/law/cfr/ej_compilation/2007/notice_2007-8.pdf). The  
12 Commission generally will propose civil penalties at the pre-probable cause stage based on the  
13 same schedule set forth in the Act, as well the Commission’s own precedents (explained more  
14 fully below), with the exception that the Commission generally will offer a 25 percent pre-  
15 probable cause “discount” to incentivize early settlement.

16           The Commission recently has announced that it is providing to respondents, in writing,  
17 the method used to determine the Commission’s opening settlement offers at the conciliation  
18 stage of certain enforcement matters. See News Release, Jan. 12, 2012, available at  
19 <http://www.fec.gov/press/press2012/20120112openmeeting.shtml>. Should discussions of how  
20 opening settlement offers are calculated be included in enforcement documents made public at  
21 the close of a matter, or should such calculations be redacted pursuant to the provisions of  
22 2 U.S.C. 437g(a)(4)(B)(i)? Would it be fair for all who are subject to enforcement proceedings

1 before the Commission to know how the Commission has dealt with penalties as to those  
2 similarly situated?

3 As discussed above, the Commission recently made available to the public several  
4 internal documents relating to the enforcement process, including a chart entitled, “Calculating  
5 Opening Settlement Offers for Non-Knowing and Willful Violations” available at  
6 [http://www.fec.gov/pdf/Additional\\_Enforcement\\_Materials.pdf](http://www.fec.gov/pdf/Additional_Enforcement_Materials.pdf). This chart is a compilation of  
7 the base formulas that have been used by the Commission to calculate opening settlement offers  
8 in prior enforcement MURs. OGC created the chart to ensure that its recommendations regarding  
9 civil penalty amounts were consistent with the Commission’s previous decisions regarding  
10 opening settlement offers. Depending on the circumstances of the matter (including aggravating  
11 and mitigating factors), OGC has recommended, and the Commission has authorized, penalties  
12 either higher or lower than those set forth in the chart. The information in the chart reflects  
13 opening settlement offers and not amounts that result after negotiations with a respondent.  
14 Moreover, this chart reflects past practice and does not necessarily reflect the most current  
15 practice at the Commission, given that the Commission may use its discretion to apply a new  
16 base formula for a particular violation. Final Conciliation Agreements approved by the  
17 Commission, which are the product of negotiations between OGC staff and respondents that  
18 result in mutually acceptable settlements, may contain civil penalties that are lower than the  
19 Commission’s opening offers. The Commission makes final settlement amounts public by  
20 placing approved Conciliation Agreements on its website.

21 As set forth in the released chart, OGC generally recommends that the Commission  
22 approve agreements with opening offers based on formulas previously approved by the  
23 Commission. The civil penalty information below has been compiled from the above-described

1 chart (superseded violations are omitted; knowing and willful violations generally result in a  
2 multiplier being added to the following penalties):

- 3 • Violations of 2 U.S.C. 432(b)(2) (collecting agent's failure to timely forward  
4 contributions) – 20 percent of the amount of the contributions at issue
- 5 • Violations of U.S.C. 432(b)(3) (commingling of campaign funds) – no standard practice
- 6 • Violations of 2 U.S.C. 432(c)(5) (recordkeeping) – base statutory penalty when part of  
7 more significant reporting violations
- 8 • Violations of 2 U.S.C. 432(d) (preservation of records) – no separate penalty for  
9 violations arising out of same transactions
- 10 • Violations of 2 U.S.C. 432(e)(1) (late filing of statement of candidacy) – \$500
- 11 • Violations of 2 U.S.C. 432(h)(1) (campaign depositories) – no standard practice
- 12 • Violations of 2 U.S.C. 432(h)(2) (excess cash disbursements) – no standard practice
- 13 • Violations of 2 U.S.C. 433 (late or non-filing of statements of organization) – \$500 for  
14 authorized committees when violation arises in context of late statement of candidacy; \$0  
15 for unauthorized committees that are found to be political committees, plus applicable  
16 penalty for failure to file reports
- 17 • Violations of 2 U.S.C. 434(a) (failure to file / timely file reports) – administrative fines  
18 plus 25 percent; pre-probable cause discount does not apply
- 19 • Violations of 2 U.S.C. 434(b) (failure to report or properly report transactions) – the  
20 greater of 15 or 20 percent of the amount at issue, or the base statutory penalty, with a  
21 maximum cap of \$250,000; with respect to taking the gross or net amount for  
22 misstatements of financial activity, the Commission has used both approaches. (For  
23 knowing and willful reporting violations, the penalty is the greater of \$11,000 or 200

1 percent of the amount in violation.) For reporting errors resulting from misappropriation  
2 of committee funds, the Commission generally has used administrative fines plus 25  
3 percent, but has not penalized committees that can show they had all of the internal  
4 controls set forth in the Commission's 2007 safe harbor (72 FR 16695 (Apr. 5, 2007)).  
5 For self-reported increased activity cases, the Commission also generally has applied  
6 administrative fines plus 25 percent, with no pre-probable cause discount, in accordance  
7 with a policy adopted by the Commission in executive session on March 16, 2007. (The  
8 policy may be found at page 224 of the PDF file available at  
9 [http://www.fec.gov/pdf/Additional\\_Enforcement\\_Materials.pdf](http://www.fec.gov/pdf/Additional_Enforcement_Materials.pdf).)

- 10 • Violations of 2 U.S.C. 434(c) (failure to file 24-hour independent expenditure reports) /  
11 434(g) (failure to file 48-hour independent expenditure reports) – administrative fines  
12 plus 25 percent, with no pre-probable cause discount
- 13 • Violations of 2 U.S.C. 438(A)(4) (prohibition on sale and use of contributor information)  
14 – no standard practice
- 15 • Violations of 2 U.S.C. 439a(b) (personal use of campaign funds) – 100% of amount in  
16 violation
- 17 • Violations of 2 U.S.C. 441a(a)(1) and (2) (making excessive contributions) – 50 percent  
18 of excessive amount when not refunded; 25 percent of excessive amount when refunded
- 19 • Violations of 2 U.S.C. 441a(a)(3) (making contributions in excess of annual / biennial  
20 limits) – 100% of excessive amount
- 21 • Violations of 2 U.S.C. 441a(f) (receipt of excessive contributions) – 50 percent of  
22 excessive amount when not refunded or not cured by redesignation / reattribution; 25  
23 percent of excessive amount when refunded or cured by redesignation / reattribution. (In

1 several recent matters, the Commission’s practice may have been to apply a 20 percent  
2 penalty for excessive contributions cured by redesignation / reattribution.)

- 3 • Violations of 2 U.S.C. 441b (making and accepting prohibited corporate contributions) –  
4 50 percent of contribution when not refunded; 25 percent when refunded. An additional  
5 base statutory penalty is added if the contributor is a government contractor (2 U.S.C.  
6 441c)
- 7 • Violations of 2 U.S.C. 441b / 114.2(f) (corporate facilitation) – 100 percent of amount of  
8 facilitated contributions for facilitator; 50 percent of unrefunded facilitated contributions  
9 for recipient
- 10 • Violations of 2 U.S.C. 441d(a) (missing disclaimer) – 20 percent of cost of  
11 communication or \$5,500 if cost is unavailable
- 12 • Violations of 2 U.S.C. 441d(c) (incomplete disclaimer) – 10 percent of cost of  
13 communication or \$2,750 if cost is unavailable
- 14 • Violations of 2 U.S.C. 441d(d) (“stand by your ad” disclaimer) – 25 percent of cost of  
15 communication
- 16 • Violations of 2 U.S.C. 441e (foreign national contributions) – 100 percent of contribution  
17 amount
- 18 • Violations of 2 U.S.C. 441e (contributions in the name of another) – the greater of 100  
19 percent of contribution amount or base statutory penalty
- 20 • Violations of 2 U.S.C. 441h (fraudulent misrepresentation of campaign authority) – no  
21 standard practice
- 22 • Violations of 2 U.S.C. 441i(e)(1)(A) (Federal candidates soliciting, accepting, directing,  
23 transferring, or spending non-Federal funds) – no standard practice

1 In addition, particularly in the context of reporting violations, OGC has recommended the  
2 following mitigating factors in some cases:

- 3 • Respondent cooperates in rectifying the violations
- 4 • Inaccurate or incomplete reports were amended after the complaint or referral but before  
5 RTB
- 6 • The matter was a sua sponte submission
- 7 • Missing information from a report was disclosed nevertheless in another report before  
8 the election
- 9 • Respondent lacks knowledge of Commission rules and procedures

10 OGC also has recommended the following aggravating factors:

- 11 • Respondent previously entered into a conciliation agreement or was reminded or  
12 cautioned of the same or similar violations
- 13 • A reporting error or omission was made on an election-sensitive report

## 14 B. Comments Sought

### 15 1. Penalty Formulas

16 The Act speaks of a penalty “amount equal to any contribution or expenditure involved in  
17 the violation.” 2 U.S.C. 437g(a)(5)(A). In the context of knowing and willful violations of 2  
18 U.S.C. 441f, the Act more generally refers to “the amount involved in the violation.” 2 U.S.C.  
19 437g(a)(5)(B). Based on the Act, the Commission frequently uses the concept of “amount in  
20 violation” (“AIV”) in determining penalties. For example, for a misreporting violation, the  
21 Commission may consider the AIV to be the amount of financial activity not reported or  
22 misreported, and derive a penalty based on the AIV. The Commission seeks comment on  
23 whether the use of AIV is proper and/or consistent with the Act. Are there any violations for

1 which AIV is not appropriate? What is the appropriate determination of AIV (e.g., is the cost of a  
2 communication or the breadth of distribution an appropriate measure of AIV in the context of a  
3 disclaimer or reporting violation)?

4 Although the Commission has made variations of civil penalty calculations public, both  
5 through release of OGC’s compiled civil penalty chart and through letters accompanying  
6 conciliation agreements, should the Commission continue to make public ongoing developments  
7 regarding civil penalties? If so, in what form should the Commission release this information: in  
8 a chart, through individual letters, or in some other manner? Would it be preferable for the  
9 Commission to adopt a chart – or guidelines – binding on itself and its staff? Finally, the  
10 Commission requests comments on any and all of the specific penalty formulas referenced  
11 above. Are the penalties appropriate for the violations?

## 12 2. Disgorgement

13 The Commission also requests comment on its practice of seeking disgorgement in  
14 addition to penalties for certain violations.

15 Disgorgement is a form of equitable relief that seeks to deprive a wrongdoer of unjust  
16 enrichment. SEC v. First Financial Corp., 890 F.2d 1215, 1231 (D.C. Cir. 1989). The Act  
17 authorizes the Commission to seek equitable relief in court if it is unable to correct or prevent a  
18 violation of the Act. 2 U.S.C. 437g(a)(6); FEC v. Christian Coalition, 965 F. Supp. 66, 70-72  
19 (D.D.C. 1997). Beyond its power to seek equitable relief in court, the Commission is required to  
20 “attempt . . . to correct or prevent such violation by informal methods of conference, conciliation,  
21 and persuasion . . .” 2 U.S.C. 437g(a)(4)(A). Thus, disgorgements required through the  
22 enforcement process may be viewed both as a derivative of the Commission’s authority to seek  
23 equitable relief in court and as a means of “correcting or preventing” violations under the Act.

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In the context of Commission enforcement actions, when the Commission determines that a committee has accepted or received a prohibited contribution in violation of the Act, the Commission has asked the committee to disgorge the contribution to the U.S. Treasury once the committee learns the contribution was improper, in addition to paying a civil penalty based on a percentage of the amount of the prohibited contribution. In the context of excessive contributions, the Commission occasionally also has offered the committee that received the excessive contribution the option to refund the excessive amount or to disgorge it to the U.S. Treasury, in addition to paying a civil penalty based on a percentage of the excessive amount. However, in matters involving the receipt of prohibited or excessive contributions made in the name of another, see 2 U.S.C. § 441f, the Commission generally does not make findings against recipient committees when they have not had knowledge of the true source of funds.

Typically, the Commission’s proposed conciliation agreements for respondents who made an impermissible contribution require the respondent to waive its right to a refund and request the recipient committee to disgorge the amount of the contribution to the U.S. Treasury.<sup>6</sup> If the recipient committee were allowed to keep a prohibited or excessive contribution, then the Commission would, in essence, be permitting the committee to use impermissible funds to influence elections. Also, since the civil penalty will generally be a lower figure than the amount of impermissible funds, a committee that has violated the Act could effectively use those funds to pay the penalty.

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<sup>6</sup> In these contexts, the Commission has sought disgorgement when it has received a waiver from the contributor. Statement of Policy Regarding Self-Reporting of Campaign Finance Violations (Sua Sponte Submissions), 72 FR 16695, 16697 (Apr. 5, 2007) (assessing sufficiency of sua sponte submission based on, inter alia, “whether an organization or individual respondent waived its claim to refunds of excessive or prohibited contributions and instructed recipients to disgorge such funds to the [United States] Treasury”) (basing reduction of civil penalty on “[a]ny appropriate refunds, transfers, and disgorgements” as a basis for assessing compliance with sua sponte policy).

1           In Fireman v. U.S., 44 Fed. Cl. 528 (1999), the plaintiff was prosecuted and pled guilty to  
2 making contributions in the names of others and making excessive contributions to two federal  
3 candidate committees, served a criminal sentence, and paid a \$5 million fine. In addition, the  
4 Commission directed the candidate committees that accepted the excessive contributions to  
5 disgorge the \$69,000 excessive amount of the plaintiff's contributions. Id. at 530. The plaintiff  
6 sought to recover the \$69,000 amount under the theory of illegal exaction. Id. at 534. In ruling on  
7 the government's motion to dismiss for failure to state a claim under Federal Rules of Civil  
8 Procedure Rule 12(b)(6), the Court of Federal Claims held that the plaintiff had stated a proper  
9 cause of action. Id. at 538. Solely for the purpose of settling the action, the government and the  
10 plaintiff subsequently entered into a settlement whereby the government agreed to return the  
11 \$69,000 to the plaintiff. See Fireman v. U.S., available at  
12 [http://www.fec.gov/law/litigation\\_CCA\\_F.shtml#fireman](http://www.fec.gov/law/litigation_CCA_F.shtml#fireman).

13           In light of the Fireman litigation, is the Commission's practice of seeking disgorgement  
14 of prohibited or excessive contributions proper? Should it make a difference if the Commission  
15 asks the source of the excessive or prohibited contribution to voluntarily waive its right to any  
16 refund? Is it appropriate for the Commission, when negotiating with the source of the  
17 impermissible contribution, to enter into an agreement that requires the source to voluntarily  
18 waive its right to a refund and to notify all recipient committees of its waiver? Should the  
19 recipient committees instead be directed to return the impermissible contribution to the original  
20 source? Should disgorgement be considered an "equitable remedy" as opposed to a fine or  
21 penalty, and therefore not limited by the general five-year statute of limitations at 28 U.S.C.  
22 2462, which by its terms applies only to civil fines, penalties and forfeitures? Does the

1 pronouncement in FEC v. Christian Coalition, 965 F. Supp. at 71, that 28 U.S.C. 2462 “provides  
2 no such shield from declaratory or injunctive relief” apply to disgorgement?

### 3 3. Penalty Schedule

4 The Commission also seeks comment on whether reliance on a penalty schedule would  
5 be appropriate, particularly in light of the courts’ admonitions that “[t]he statutory language  
6 ‘makes clear [that] [t]he assessment of civil penalties is discretionary.’” FEC v. Kalogianis, 2007  
7 WL 4247795 at \*6 (M.D. Fla. 2007) (quoting FEC v. Friends of Jane Harman, 59 F. Supp. 2d  
8 1046, 1058 (C.D. Cal. 1999)); see also FEC v. Ted Haley Cong. Comm., 852 F.2d 1111, 1116  
9 (9th Cir. 1988) (“A court’s discretion on civil penalties is reviewed under an abuse of discretion  
10 standard.”). In order to ensure consistency, should a penalty chart be viewed as a standard from  
11 which deviations must be justified? Would the penalty chart outlined above provide the  
12 Commission sufficient discretion to consider the particulars of a violation? Would the use of the  
13 chart result in unfair treatment of respondents, particularly novice and unsophisticated actors?  
14 Are the mitigating and aggravating factors set forth in OGC’s internal guidance appropriate?  
15 Should other factors, such as whether the candidate won or lost the election (or dropped out of  
16 the race), the margin of victory or defeat, intent to run again in the future, or campaign resources,  
17 be considered? Could consistency be maintained through an alternative approach to penalty  
18 calculation, or are the current opening offer formulas needed to maintain consistency? Are other  
19 options available under the Act?

20 Should the Commission not accept civil penalties less than a certain percentage of the  
21 amount in violation, to ensure that penalties exceed the “cost of doing business” for the particular  
22 respondent involved? See, e.g., MUR 5440 (The Media Fund) (civil penalty approximately 1%  
23 of amount in violation of over \$55 million). Do low civil penalties in Commission settlements,

1 which are generally made public at the close of a matter long after the election at issue is over,  
2 erode compliance incentives and encourage potential violators to ignore the Act and Commission  
3 regulations?

4 The total civil penalties in OGC enforcement matters has decreased substantially over the  
5 past several fiscal years, as follows: \$5,563,069 in 2006; \$4,038,478 in 2007; \$2,385,043 in 2008  
6 (the Commission lacked a quorum for approximately 6 months in 2008 and was thus unable to  
7 take actions such as accepting settlements and closing enforcement cases); \$807,100 in 2009;  
8 \$672,200 in 2010; and \$527,125 in 2011. See  
9 [http://www.fec.gov/press/press2011/FEC\\_Joint\\_Statement-Nov3.pdf](http://www.fec.gov/press/press2011/FEC_Joint_Statement-Nov3.pdf) at 11;  
10 <http://www.fec.gov/em/enfpro/enforcestatsfy03-08.pdf>;  
11 <http://www.fec.gov/em/enfpro/enforcestatsfy09-10.pdf>. Should the Commission be concerned  
12 about the downward trend in the collection of civil penalties, or can the decrease be explained by  
13 factors other than the Commission's enforcement decisions (e.g., court cases striking down  
14 portions of the Act and regulations; increased use of Alternative Dispute Resolution)?

15 In the context of penalties sought by the Commission in litigation pursuant to 2 U.S.C.  
16 437g(a)(6) due to unsuccessful attempts at conciliation, the courts have set forth the following  
17 factors for determining the appropriate penalty: (1) the good or bad faith of the respondents; (2)  
18 the injury to the public; (3) the respondent's ability to pay; and (4) the necessity of vindicating  
19 the authority of the responsible federal agency. FEC v. Furgatch, 869 F.2d 1256 (9th Cir. 1989)  
20 (affirming a \$25,000 penalty sought by the Commission); FEC v. Kalogianis, 2007 WL 4247795  
21 (M.D. Fla. 2007) (reducing a nearly \$300,000 penalty sought by the Commission to \$7,000); and  
22 FEC v. Harman, 59 F. Supp. 2d 1046 (C.D. Cal. 1999) (holding that payment of a penalty and  
23 disgorgement were not required due to technical nature of violations).

1           Additionally, the courts have cited defendant’s state of mind when committing the  
2 violation. Kalogianis, 2007 WL 4247795 at \*6; Harmon, 59 F. Supp. 2d at 1058. Does the  
3 penalty chart in its current form provide for sufficient consideration of these factors? Should  
4 these factors, set forth by the courts in the context of enforcement matters that have proceeded to  
5 litigation, also be applied to the Commission’s probable cause conciliation process under  
6 2 U.S.C. 437g(a)(5), as well as the Commission’s practice of seeking pre-probable cause  
7 conciliation? Would the Commission be better served by replacing the current penalty chart with  
8 an approach that begins at a baseline of zero and builds up to an appropriate penalty based on the  
9 factors identified by the courts? Alternatively, instead of using penalty formulas that, as reflected  
10 in the current schedule, may be substantially lower than the statutory penalties, should the  
11 Commission start with the penalties set forth at 2 U.S.C. 437g(a)(5) and work downward based  
12 on mitigating factors? Also, should the Commission continue its current policy of offering a 25%  
13 pre-probable cause discount to the calculated penalty? Does a 25% discount appropriately  
14 incentivize early settlement or would respondents be sufficiently motivated to settle at the RTB  
15 stage with a lesser or no discount?

## 16 VI. Alternative Dispute Resolution

### 17 A. Background

18           The Commission established the Alternative Dispute Resolution Office (“ADRO”) in  
19 October 2000 as authorized by the Administrative Dispute Resolution Act of 1996, 5 U.S.C. 571-  
20 584, which required Federal agencies take steps to promote the use of ADR. The Commission’s  
21 ADR program was designed to enhance compliance by encouraging settlements outside the  
22 agency’s regular enforcement context. By expanding the tools for resolving complaints and  
23 internal referrals, the program was aimed at improving the Commission’s ability to process

1 complaints and resolving matters more rapidly using fewer resources. Other benefits include  
2 saving costs and time for respondents whose cases are processed by ADRO. Respondents are  
3 afforded the opportunity to settle cases before the Commission makes any finding of a violation,  
4 providing an attractive incentive to engage in good faith negotiations with ADRO. The  
5 Commission has included a comprehensive description of its ADR program on the website. See  
6 <http://www.fec.gov/em/adr.shtml>.

7 Although the Commission received several comments on the ADR program during its  
8 2009 enforcement hearing, no substantive changes have been made to the program since that  
9 time. See Agency Procedures Recommendations, available at  
10 <http://www.fec.gov/law/policy/enforcement/2009/recommendationssummary.pdf>. For example, a  
11 recommendation to set guidelines for negotiating penalties and other remedial measures has yet  
12 to be considered by the Commission. See id. at 2. Accordingly, the Commission believes it may  
13 be beneficial to revisit certain of those issues and to address other relevant ADR topics.

#### 14 B. Proposals and Issues to Consider

##### 15 1. Commission Approval or Rejection of ADR Settlements

16 From the time the ADR program was implemented in 2000, the Commission's only  
17 options when reviewing ADR settlements have been either to (1) accept the agreement without  
18 revisions or (2) reject the agreement in its entirety and dismiss the matter. This policy has the  
19 advantage of giving ADRO wide latitude to fashion agreements without Commission  
20 involvement – thereby speeding up the process – while providing respondents with a unique  
21 incentive by assuring that any agreement they sign will represent the end of the case  
22 (respondents may be more likely to use the ADR program if they can be confident their  
23 settlements are not subject to renegotiation). The obvious disadvantage is that Commission is

1 boxed in; since it cannot direct ADR to renegotiate an agreement it finds unpalatable, its role as  
2 final agency arbiter is arguably undermined. Also, a respondent may be unduly benefited if, for  
3 example, an agreement with a stiff penalty is dismissed because the Commission does not like  
4 certain language contained therein.

5         The Commission seeks comment on its “accept or dismiss” policy to determine whether  
6 the advantages outweigh the disadvantages and how the policy might be revised to strike a more  
7 appropriate balance. For example, the Commission could simply vote on whether to instruct  
8 ADRO to renegotiate problematic aspects of a settlement upon the motion of one Commissioner.  
9 If a more narrowly tailored approach is deemed preferable, ADRO could inform respondents at  
10 the start of higher priority ADR matters (*e.g.*, where the amount in violation appears to be above  
11 a particular amount) that the Commission reserves the right to direct ADRO to renegotiate any  
12 ADR settlement brought before it.

## 13 2. Civil Penalties

14         Similar to the civil penalty issues raised above concerning the traditional enforcement  
15 process, the Commission seeks comment on the penalty scheme used by ADRO so the  
16 Commission can better evaluate the program’s effectiveness. The main objective should be to  
17 achieve a balance so that penalties are sufficiently low for respondents to prefer participating in  
18 the ADR program rather than being subject to OGC processing, yet high enough to deter future  
19 violations and promote compliance. The Commission recognizes that ADR tends to focus more  
20 on non-monetary “behavioral” remedies in its settlements and may offer a wider array of  
21 settlement options to respondents than does OGC (*e.g.*, attendance at a Commission-sponsored  
22 workshop), but the importance of securing civil penalties to modify behavior should not be  
23 understated, even in cases where the amounts in violation are comparatively low. Although

1 respondents may be quick to make counteroffers with very small and often no penalties, the  
2 Commission is not necessarily served well by accepting such offers. In order for terms of  
3 settlement to serve as meaningful deterrents, the penalty should at least exceed the “cost of doing  
4 business” for the particular respondent involved. There still may be sound reasons why ADR  
5 settlements often contain no or minimal penalty amounts, but perhaps there should be a fuller  
6 airing of the reasons for accepting such terms so that the Commission can determine whether the  
7 proper balance of program objectives is being achieved and maintained.

8         As it has recently done with OGC’s civil penalty calculations as discussed above, the  
9 Commission is considering whether to apprise respondents of its “opening offer settlement”  
10 formulas for the typical violations it encounters. ADRO currently employs a penalty formula  
11 scheme resembling a scaled-back version of the formulas used by OGC. After a respondent  
12 agrees in writing to “buy in” to the ADR process, ADRO generally communicates an opening  
13 offer by telephone (in contrast with OGC-drafted written agreements containing opening offers  
14 approved by the Commission) and negotiates terms to include in a written settlement. Although  
15 the ADR program was set up to operate without extensive Commission involvement – thus  
16 promoting faster resolution of cases – it may nevertheless be in the Commission’s interest for  
17 ADRO to inform it of the parameters for negotiation before it begins settlement negotiations.  
18 Currently, both the opening and negotiated figures are simultaneously presented to the  
19 Commission along with an agreement already signed by the respondent; the Commission does  
20 not have any prior opportunity to review the opening offer as it does with OGC reports  
21 recommending conciliation. The Commission could consider having ADRO provide a proposed  
22 penalty amount in its assignment memorandum to the Commission, since the amount in violation  
23 is generally clear at that time. The memoranda could be circulated on a no-objection basis to

1 maintain efficiency (it is currently circulated on an informational basis). The Commission  
2 recognizes that including such information may increase the likelihood of Commission  
3 objections and thus slow down the ADR process; accordingly, the Commission seeks comment  
4 on how to maintain adequate oversight of ADRO's civil penalty regime.

5 VII. Other Issues

6 The Commission welcomes comments on other issues relevant to these enforcement  
7 policies and procedures, including any comments concerning how the FEC might increase the  
8 fairness, transparency, efficiency and effectiveness of the Commission.

9 On behalf of the Commission.

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12  
13 \_\_\_\_\_  
14 Caroline C. Hunter  
15 Chair  
16 Federal Election Commission

17 DATED: \_\_\_\_\_  
18 BILLING CODE: 6715-01-P  
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